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No. 93-155

In The

Supreme Court of the United States

October Term, 1993

GENE AND KATHLEEN SOUTHARDS, *et al.*,

Petitioners,

vs.

MOTEL MANAGEMENT CO., n/k/a B&M MANAGEMENT CO., INC., HARRY KNIGHT, as Tax Collector of Monroe County, Florida, and JAMES HERNDON, as Executive Director of Department of Revenue, State of Florida,

Respondents.

Petition For Writ Of Certiorari To The District Court Of Appeal, Third District, State Of Florida

BRIEF IN OPPOSITION OF RESPONDENT MOTEL MANAGEMENT CO., n/k/a B&M MANAGEMENT CO., INC.

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QUESTIONS PRESENTED

Whether the Court should grant certiorari to consider whether the application of Florida's *ad valorem* tax statute to the Petitioners' ownership interest in time-share property is an unconstitutional deprivation of their rights under the due process and equal protection clauses of the United States Constitution where:

(a) the statute is reasonably related to a permissible state objective and is not discriminatory, arbitrary or oppressive,

(b) the statute is carefully and narrowly drawn to satisfy the State of Florida's substantial and compelling interest in the imposition and collection of *ad valorem* property taxes on time-share developments, and

(c) the statute treats Petitioners no differently than all other collective owners of a single parcel of real property?

ENTITIES RELATED TO RESPONDENT MOTEL MANAGEMENT CO., n/k/a B&M MANAGEMENT CO., INC.

None.

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STATEMENT OF THE CASE

Parties

Petitioners Gene and Kathleen Southards are the fee simple owners of one week of an interval ownership condominium unit ("time-share") at the Ocean 80 Resort in Key Largo, Florida. They are the representatives of a class of plaintiffs similarly situated as time-share unit-owners at the Ocean 80 Resort. P.App. 29.[1]

Respondent Motel Management Co., n/k/a B&M Management Co., Inc. ("Motel"), is the owner of tax certificates issued by the Tax Collector of Monroe County, Florida, encumbering the Ocean 80 Resort property.

Respondent Harry F. Knight is named in his capacity as the tax collector of Monroe County, State of Florida ("tax collector").

Respondent James Herndon is named in his capacity as Executive Director of the Department of Revenue of the State of Florida ("Florida").

Proceedings Below

Petitioners filed an amended complaint against Respondents seeking a determination of "whether the provisions of § 192.037, Fla. Stat., are unconstitutional as applied to plaintiffs and other members of the class in that its application results in an unlawful taking of plaintiffs' real property interest by government action without

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[1] References to Petitioners' appendix will be referred to as "P.App. ___." All such references are to documents in the record below.

due process of law, contrary to Article I, Section 2, Florida Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution." P.App. 35. Petitioners also sought a determination that the tax certificates sold to Motel for the tax years 1984-87 are void *ab initio*, and temporary injunctive relief to preclude issuance of a tax deed. *Id.*

The trial court denied the temporary injunction, but the appellate court reversed. *Southards v. Motel Management Co.*, 567 So. 2d 523 (Fla.Ct.App. 1990). P.App. 15. This injunction has since expired, and both the trial court and this Court have declined to reinstate it.[2]

The trial court subsequently entered final summary judgment against Petitioners, ruling that the statute was constitutional as applied to them. P.App. 18. The appellate court affirmed, P.App. 1, and denied rehearing. P.App. 28. The Supreme Court of Florida denied review. P.App. 11. This petition followed.

Facts

The parties filed a joint statement of undisputed material facts in the trial court. P.App. 29. Unless otherwise indicated, the following facts are taken directly from there.

Petitioners purchased a one-week time-share interest in the Ocean 80 Resort for $4,000. They are entitled to occupy the unit on the 32nd week of each year, and own a

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[2] The tax deed has nonetheless not yet been sold.

remainder interest in fee simple of the common areas as tenants in common with all of the other unit-owners.

The developer was the managing entity[3] of the Ocean 80 Resort from 1984 to 1986, at which time the unit-owners' association was elected to that position. For each tax year at issue (1984-1988), the managing entity proposed a budget for adoption by the board of directors of the unit-owners' association, and a copy of the proposed budget was circulated to all unit-owners, including the Petitioners. The budget included provision for all anticipated annual expenses, including *ad valorem* taxes. The unit-owners approved each budget and were assessed their *pro rata* share in order to fund the payment of expenses. Nonetheless, the managing entity failed to collect sufficient sums from unit-owners either by assessment or by special assessments to pay for all of the budgeted expenses, including the *ad valorem* taxes. The managing entity also failed to establish the required escrow account for *ad valorem* taxes, in violation of Fla. Stat. § 192.037(6)(a).

Of the 4,029 unit weeks at the Ocean 80 Resort, only 883, or 22% of the privately held time-share units, regularly paid assessments. The developer, which owned some 50% of the time-share units, never paid assessments.

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[3] Fla. Stat. § 192.037(1) provides:
For the purposes of *ad valorem* taxation and special assessments, the managing entity responsible for operating and maintaining fee time-share real property shall be considered the taxpayer as an agent of the time-share period titleholder.

In an effort to circumvent the statutory scheme for the taxation of time-share properties, the managing entity filed lawsuits contesting the tax assessment for each year at issue in the state trial court and, as required by Fla. Stat. § 194.171(3),[4] paid the tax collector the amount admitted in "good faith" to be due as a condition to maintaining those lawsuits. In fact, the amounts paid were all that was collected.

After each of these lawsuits had been involuntarily dismissed, the tax collector applied the amount paid by the managing entity in "good faith" to the total amount due for each year. The tax certificates represent the remaining unpaid taxes, together with statutory interest and charges.

Section 192.037 of the Florida Statutes is the statutory framework for the assessment, collection and payment of *ad valorem* taxes on time-share property. Section 192.037(1) provides that the managing entity is responsible for operating and maintaining the time-share property, and "shall be considered the taxpayer as an agent of the time-share period titleholder." Section 192.037(2) provides that time-share units "shall be listed on the assessment rolls as a single entry." Section 192.037(3) obligates the tax assessor to send a single *ad valorem* tax bill to the

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[4] Fla. Stat. § 194.171(3) provides:
Before an action to contest a tax assessment may be brought, the taxpayer shall pay to the collector not less than the amount of tax which he admits in good faith to be owing. The collector shall issue a receipt for the payment, and the receipt shall be filed with the complaint.

managing entity. It does not permit the tax assessor to send a separate tax bill to the owner of each time-share interest, and there is no dispute that each of the tax bills for 1984 through 1988 were sent to the managing entity.

Pursuant to Fla. Stat. § 197.432, the tax collector sold tax certificates on the Ocean 80 Resort property to enforce payment of the unpaid taxes. Motel purchased these tax certificates for years 1984 through 1988 for more than $1.6 million. The tax certificates constitute a lien upon all of the real property of the Ocean 80 Resort. Motel thereafter applied for a tax deed pursuant to the provisions of Fla. Stat. § 197.502. No tax deed has been issued.

In 1989, the managing entity obtained a $1.7 million money judgment against the developer for unpaid assessments, but made no effort to enforce the judgment or to file and enforce liens as permitted by Florida law against the time-share interests of non-paying owners, including the 2,000 units owned by the developer.

SUMMARY OF ARGUMENT

There has been no violation of Petitioners' due process or equal protection rights under the United States Constitution. Florida's statutory method for imposing and collecting *ad valorem* property taxes on time-share interests is reasonably related to a permissible state objective and is not discriminatory, arbitrary or oppressive. Indeed, the statute treats time-share owners no differently than all other joint owners of a single parcel of property.

Petitioners have misread the law in an attempt to apply the "strict scrutiny" test to invalidate application of the *ad valorem* tax law. That test is used only when a fundamental right is involved and when the statute operates to the disadvantage of some "suspect class," such as one based upon race, nationality or alienage. These time-share owners do not qualify as a "suspect class." While the right to own property is guaranteed by the Constitution, taxation of that property by a state may not be unreasonably impeded. This is particularly true where the statute treats Petitioners the same as it treats other multiple owners of a single parcel of real estate.

Petitioners argue that they have paid their property taxes in full, yet now face loss of their time-share interests because of the failure of other co-owners to pay taxes. This is not an accurate statement of the facts, for Petitioners have *not* paid their property taxes in full. They have paid to the managing entity only their assessment, which included a *pro rata* share of such taxes. The sum due the tax collector is the tax due on the entire time-share development, and not simply the Petitioners' share of the total assessment. Petitioners' position is akin to that of a joint venturer who pays its share to the managing joint venture partner. If that partner then fails to remit the full amount of tax due the tax collector, the venturer cannot seek to exempt his interest in the joint venture property from the lien of the tax collector. If the whole tax is not paid, the joint venturer's interest in the property is subject to the tax despite having contributed its share. The remedy is against the non-paying parties, and not against the state.

Petitioners further mischaracterize the facts by claiming the tax collector accepted a partial payment of tax in violation of Fla. Stat. § 192.037(7). That statute precludes the tax collector from accepting direct payment of a timeshare unit-owners' *pro rata* share, requiring the tax collector to accept only the whole amount due. Under this act, the whole tax is required to be collected by and is payable only by the managing entity.

Here, in an effort to evade the stricture of Chapter 197 of the Florida Statutes, the managing entity filed lawsuits for each tax year at issue to protest the amount of the assessment on the Ocean 80 Resort, and deposited with the tax collector the amount of tax admitted in good faith to be due. In fact, the amount deposited was all that was collected. Florida law mandates a good faith payment in order for the court to have jurisdiction of the tax protest suit. The challenge to the assessments was unsuccessful and, upon dismissal, the tax collector applied the funds deposited to the amount owed and sold tax certificates for the balance. This does not amount to a violation of Petitioners' constitutional rights.

None of the grounds stated warrant granting the petition. It should be denied.

ARGUMENT

I.

THE STATUTE AS APPLIED DOES NOT VIOLATE PETITIONERS' DUE PROCESS OR EQUAL PROTECTION RIGHTS

The petition should be denied because it does not demonstrate that application of § 192.037(2) and (7) of the Florida Statutes results in any violation of Petitioners' due process or equal protection rights under the Fifth and Fourteenth Amendments to the Constitution.

A.

The Statute Is Reasonably Related To A Permissible State Objective And Is Not Discriminatory, Arbitrary Or Oppressive

The Florida Supreme Court has held, and Petitioners do not challenge, that § 192.037 is facially constitutional on due process and equal protection grounds. *See Day v. High Point Condominium Resorts, Ltd.*, 521 So. 2d 1064 (Fla. 1988). Petitioners challenge only the constitutionality of the application of the statute as to them. Petitioners conceded to the state appellate court that "if the statute is unconstitutional as applied in this case, it is unconstitutional as applied in *all* cases – a result which the [Florida Supreme Court] in *Day* clearly rejected." P.App. at 2 (emphasis appears in original). The Florida Supreme Court has held the "reasonable relation" test is properly applicable to a due process and an equal protection challenge to Florida's statutory scheme governing taxation of time-share units. *See Day*, 521 So. 2d at 1066-67.

This test also applies to Petitioners' constitutional challenge to the tax statute: an act is not violative of the due process or equal protection clauses of the Federal Constitution when the statute bears a reasonable relation to a permissible legislative directive and is not discriminatory, arbitrary or oppressive. *See Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Allied Stores v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959); *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 660 (1954); *Randolph v. Simpson*, 410 F.2d 1067 (5th Cir. 1969).

The statute at issue was enacted to establish a reasonable means of assessing and collecting taxes on time-share property. The Florida Supreme Court has already held, and Petitioners do not contest, that this statute was intended to address the unique problems caused by subdividing a condominium unit into many individual fee time-share estates. *Day*, 521 So. 2d at 1065.[5] That court explained:

> The administrative problem is illustrated by the increase in the number of taxpayers if a 200-unit condominium were sold as one-week time-shares. This would result in *10,000* potential taxpayers as owners of a fee time-share estate. In addition, many time-share owners reside in other localities, many outside the state. *Without*

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[5] The interpretation of a statute by the highest court of a state becomes part of the statute for the purpose of determining its validity in this Court. *See Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959); *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 660 (1940).

> *question, the fee time-share concept establishes administrative problems for taxing authorities.* The Legislature . . . addressed the *ad valorem* assessment and collection problems by adopting Section 192.037, Florida Statutes.

Id. (emphasis supplied).

Certainly the imposition and collection of *ad valorem* property taxes is a permissible state objective. The only issue then is whether Florida's assessment and collection scheme is discriminatory, arbitrary or oppressive as applied to Petitioners. It is not.

A state has broad legislative choice in the formulation of its tax structure. *See Allegheny*, 488 U.S. at 344; *Kahn*, 416 U.S. at 355. When a state legislature exercises its powers of taxation, the courts afford the statute enacted every favorable presumption. *Allied Stores*, 358 U.S. at 529. This Court presumes that state legislative enactments were not adopted arbitrarily or without good reason, and were enacted in order to further some legitimate state policy. *Id.* Only a clear and demonstrated usurpation of the taxing power warrants judicial interference, *see Walters v. City of St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954), for a state legislature is granted broad freedom of classification in the field of taxation.

The person attacking the questioned statute must negate *every* conceivable basis which might support it. *See Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 660 (1954); *Just Valuation & Taxation League, Inc. v. Simpson*, 209 So. 2d 229 (Fla. 1968). "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy,

there is no denial of the equal protection of the law." *Allegheny*, 448 U.S. at 344, *quoting Forman Co. v. Kentucky*, 217 U.S. 563, 573, 30 S.Ct. 578, 54 L.Ed. 883 (1910).

While it is true that a state must proceed on a rational basis and may not resort to a classification which is palpably arbitrary, a statute which discriminates in favor of a particular class is *not* arbitrary if that discrimination is founded upon a reasonable distinction or difference in state policy. *See Allied Stores*, 358 U.S. at 529.

Here the act is not discriminatory against Petitioners at all, for it does not treat time-share owners any differently than it does other multiple owners of property. *Day*, 521 So. 2d at 1066.[6] The tax bill is mailed to one address, Fla. Stat. §§ 192 and 197, *et seq.*, and Chapter 192 of the Florida Statutes provides that all rights and privileges of property owners pursuant to Chapter 194 related to contesting and appealing tax assessments applies to *both* the managing entity and to the individual time-share owners. *See* Fla. Stat. § 192.037(4). *See also Day*, 521 So. 2d at 1066; *Spanish River Resort Corp. v. Walker*, 497 So. 2d 1299, 1305-6 (Fla.Ct.App. 1986); *Driftwood Mgmt. Co. v. Nolte*, 497 So. 2d 740 (Fla.Ct.App. 1986); *Oyster Point Resort Condominium Ass'n v. Nolte*, 497 So. 2d 1306 (Fla.Ct.App. 1986).

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[6] Time-share ownership is a creature of statute. It is unknown in the common law, and is not considered the same as traditional forms of property ownership. *Dept. of Business Regulation v. Smith*, 471 So. 2d 138, 143 (Fla. 1985). In Florida, it "is a form of multiple fee ownership of one parcel of property where the rights of use, occupancy and possession of a time-share apartment have been sold and transferred by deed to each of the time-share owners." *Day*, 521 So. 2d at 1065.

The concept of a managing entity acting on behalf of multiple owners is similar to other "managers" of collectively owned property, such as the managing partner of a joint venture or of a general or limited partnership. The managing entity, like a managing partner, is the only party to receive a tax bill covering a single parcel of property. As with other forms of shared property arrangements, the managing entity or partner collects payments from the multiple owners and remits the *total* amount due the tax collector. The individual partners, joint venturers or co-owners do not have the right to make a partial payment to the tax collector of their share of the tax based on their percentage of ownership, and they cannot free their partnership interest from the lien imposed on the entire property for unpaid taxes by tendering payment of only their *pro rata* share of the tax due. Failure of a partner to contribute its proportionate share of tax does not relieve co-partners of their tax obligation. Under Florida law, the tax collector is not permitted to accept a time-share owner's *pro rata* payment any more than he is permitted to accept a *pro rata* payment from a joint owner of a single parcel of property. Neither is a partial owner of property entitled to remit its *pro rata* share to free its property from a tax lien. As the statute treats time-share owners the same as other multiple owners of a single parcel of property, the statute cannot be characterized as discriminatory, arbitrary or oppressive.

Petitioners complain the act discriminates against them because it precludes the tax assessor from assessing an individual time-share unit by issuing a separate tax bill and because the act prevents the owners from paying

to the tax collector directly their *pro rata* share. Petitioners ignore, however, all of the reasons why the act prevents individual unit-owners from paying only their share of *ad valorem* taxes. *See* discussion at pp. 9-10 *infra*.

"The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Allegheny*, 488 U.S. at 3455, *quoting Hillsborough v. Cromwell*, 326 U.S. 623, 66 S.Ct. 445, 90 L.Ed. 358 (1946). "A state tax law is not arbitrary although it discriminates in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy, not in conflict with the federal Constitution." *Kahn*, 416 U.S. at 355, *quoting Allied*, 358 U.S. at 528. The issue "is not whether the [tax] statute could have been drafted more wisely, but whether the lines chosen by the Florida Legislature are within constitutional limits." *Kahn*, 416 U.S. at 356 n.10. These "constitutional limits" impose no "iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation." *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159, 50 S.Ct. 310, 74 L.Ed. 775 (1930). Mr. Chief Justice Hughes, in speaking for the Court, said:

> To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure."

Id. See also Madden v. Kentucky, supra.

The right to acquire and possess property is subject to the lawful exercise of the state's sovereign power to

protect the public. *Hav-A-Tampa Cigar Co. v. Johnson*, 5 So. 2d 433 (Fla. 1942). This power includes reasonable means to ensure that the government can collect the monies necessary to promote the general welfare and protection of its citizens. *City of Deltona Beach v. King*, 181 So. 1 (Fla. 1938). Thus, although a person has an inalienable right to own property, statutes which are enacted within the scope of the state's power of taxation do not constitute an infringement of that right. *See, e.g., Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 660 (1954); *Allied Stores*, 358 U.S. 522, 79 S.Ct. 433, 3 L.Ed.2d 480 (1959); *Randolph v. Simpson*, 410 F.2d 1067 (5th Cir. 1969). A tax laid by authority of law creates a duty and obligation which may be enforced by any means which the legislature may from time to time adopt, and there is no vested right in a mode or procedure for collection. *League v. State of Texas*, 184 U.S. 156, 22 S.Ct. 475, 46 L.Ed. 478 (1902).

The answer to much of Petitioners' criticism lies in what the managing entity did or, more properly, did not do to protect them. Petitioners acknowledge that the managing entity mismanaged the time-share development by failing to escrow the portion of the monies collected by assessment of the owners which was needed for payment of *ad valorem* taxes, as required by Fla. Stat. § 192.037(6)(a); by failing to place liens on the non-paying time-share owners' fee interests; by failing to foreclose those liens; and by failing to enforce the association's outstanding judgment against the developer for its unpaid assessments. P.App. at 31, 34. The Florida statute is not unconstitutional as applied to Petitioners merely because the managing entity failed to move to protect their interest.

In applying the rational basis test to a constitutional challenge to a tax law, the analysis "requires only that a statute bear some reasonable relationship to a legitimate state purpose." This Court has held that although some incidental inequality may result, it does not render the law unconstitutional:

> That the statute may result incidentally in some inequality or that it is not drawn with mathematical precision will not result in its invalidity. Rather, the statutory classification to be held unconstitutionally violative of the equal protection clause under this test must cause different treatments so disparate as relates to the difference in classification so as to be wholly arbitrary.

Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); *Walters v. City of St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954).

For all of these reasons, Fla. Stat. § 192.037(2) and (7) are constitutional as applied.

1. The Strict Scrutiny Test Is Not Applicable

Petitioners' reliance on the "strict scrutiny" test is misplaced. That test applies only when some "fundamental right" is involved, and only when the act operates to the disadvantage of some suspect class, such as one based upon race, nationality or alienage. The strict scrutiny test requires close review of the governmental interest claimed to justify the classification in order to determine whether that interest is substantial and compelling, and it requires a determination of whether the statute enacted is necessary and has been precisely drawn. *Examining Board*

v. Flores De Otero, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976).

The method by which multiple owners of a single parcel of property are taxed is not a constitutionally protected right. The governmental interest at stake is the assessment and collection of taxes, which is the lifeblood of the state. The taxing power is "one of the primary indicia of sovereignty," *Illinois v. Kentucky*, 111 S.Ct. 1877, 1882 (1991), and this Court "has recognized repeatedly that state sovereignty is a fundamental component of our system of government." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 573 (1985) (Powell, J. dissenting). The Court has stated "[i]t is upon taxation that the several states chiefly rely on to obtain the means to carry on their respective governments." *Dows v. City of Chicago*, 78 U.S. 108, 110 (1871). It is "the imperative duty of the court to recognize as paramount, and enforce with promptness and vigor, the just claims of the authorities for the prescribed contributions to state and municipal revenue. . . . The courts of the United States have always recognized the importance of leaving the powers of the State in respect to taxation unimpaired." *In re Tyler*, 149 U.S. 164, 187 (1893).

The state is entitled to an efficient and reasonable means for the assessment and collection of taxes. To give notice of the tax assessment and to require separate tax bills to each time-share owner, as Petitioners suggest, grossly infringes upon the state's broad power of taxation. The burden Petitioners wish to impose is best illustrated by the Florida Supreme Court's example in *Day*, 521 So. 2d at 1065, of a typical 200-unit condominium sold as one-week time-shares. This would result in *10,000*

potential taxpayers on just the one parcel of property. At a cost of $6.98 per notice,[7] that is a staggering $69,800 just to issue notices on a single time-share development. Multiply that sum by the number of time-share developments in Florida, and the figure is mind-numbing.

Cost aside, what Petitioners are really asking for is special treatment. Rather than being classified for *ad valorem* tax purposes the same as other forms of collective ownership of a single parcel of realty, they demand separate and different treatment by which they will be permitted to do what other co-owners cannot. Instead of creating a separate classification for time-share owners, the current statutory scheme treats all multiple owners of one parcel of property *alike*. Accordingly, even assuming the strict scrutiny test applies, § 192.037(2) and (7) is constitutional. It is therefore not necessary to grant the petition to further address what the Florida Supreme Court so ably did in *Day* and the intermediary Florida appellate court did in this case below.

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[7] This was the undisputed administrative cost of sending separate tax bills to each time-share owner for only their "share" in 1990, the year Petitioners initiated the litigation.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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